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No. 00-529

In the
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2000

Medical Management Sciences, Inc.,
Petitioner,

v.

Medical Billing, Inc. and
Reich, Seidelmann & Janicki,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

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REPLY MEMORANDUM IN FURTHER SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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STATEMENT PURSUANT TO RULE 29.6

A Rule 29.6 Statement was provided in petitioner's Petition for Writ of Certiorari. That statement remains current and accurate and is incorporated herein by reference.

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INTRODUCTION

MBI's Brief in Opposition to certiorari jurisdiction is purposefully opaque. By studied vagueness, references to extraneous and immaterial matters, and a one-sided recitation of "facts" tellingly devoid of any citation to the record, MBI seeks to conflate discrete legal issues as if to somehow prevent this Court from focusing on two basic facts: First, that the courts below granted judgment in favor of the verdict loser (MBI) on legal grounds not preserved prior to submission of the case to the jury. And, second, that such practice -- which is anathema to the Seventh Amendment and the orderly administration of justice -- reflects an unresolved circuit split.

MBI provides snippets of colloquy, out of context, evidently aimed at fostering the impression that MBI somehow achieved preservation of the critical legal issues -- despite its failure to make the requisite Rule 50(a) motion raising such issues (either orally or in writing). MBI's self-serving protestations notwithstanding, however, cryptic or elliptical innuendo cannot suffice to satisfy the requirements of Rule 50(a).

Nor, after the time for post-trial motions has come and gone, may a district court *sua sponte* excuse a party's fatal non-compliance with the mandates of Rule 50(a) by simply "proceed[ing] on the assumption" that the critical issue was "on the table." And yet, that is precisely what happened here.

REASONS FOR GRANTING THE WRIT

I. THE COURTS BELOW DID NOT APPLY RULE 50 IN ACCORDANCE WITH ITS TERMS

The clear question presented by the Petition is whether a federal court may re-examine a jury verdict on legal grounds not preserved by the verdict-loser prior to submission of the case to the jury. MBI, knowing that it cannot prevail on this question, opts for the curious stratagem of arguing that "the record below does not raise this question." (Brief in Opposition at 12). This argument withers under scrutiny.

The standout fact in MBI's opposition brief is that MBI cannot identify any point in the trial record where it directly adverted to -- let alone preserved -- the notion that the two contracts (which formed the heart of the trial and appeal) were unambiguous, precluding admission of extrinsic evidence of contractual intent. Tellingly, MBI goes to considerable length, in adjective-laden prose, recharacterizing the record. Ultimately, MBI centers its attack around the assertions that certiorari jurisdiction is inappropriate because "MBI properly preserved, prior to the verdict, the particular legal grounds upon which judgment was entered in its favor," and this case provides an improper vehicle to bring the question presented before the Court for review. (MBI Brief in Opposition at 12, 13-16, 19-21). But the record citations that MBI claims should be treated as *tantamount* to a

Rule 50(a) motion (supposedly preserving "plain meaning" for post-verdict review) do not meet the required standard.

The record discloses that MBI sought judgment as a matter of law on one discrete and narrow issue. That issue -- the only issue on which MBI sought judgment as a matter of law -- was the question of when the contract terminated. (See App. B at 33a, 36a, 71a-72a). Indeed, MBI's Rule 50(a) motion papers contained no hint that MBI was seeking dismissal of MMS's main contention on parol evidence grounds, a notion that, rather, was raised *sua sponte* by the trial court more than a year after the jury had gone home. Nor did MBI advance the more sweeping rationale, embraced by the divided appellate panel, that the contract could be resolved on its "four corners." If it had, the trial court would never have had to "***assume[]*** the issue was on the table." (App. B at 55a n.9) (emphasis supplied).

"[M]erely moving for directed verdict is not sufficient to preserve any and all issues that could have been, but were not raised in the directed verdict motion." United Int'l Holdings Inc. v. The Wharf (Holdings) Ltd., 210 F.3d 1207, 1229 (10th Cir. 2000). Indeed, "[t]he statement of one ground precludes a party from claiming later that the motion should have been granted on a different ground." *Id.* (quoting 9A Charles A. Wright & Kenneth A. Graham, Jr., Federal Practice and Procedure § 2533 (1995), 310).

Despite carefully extracting snippets from the trial record (and ensconcing these in a self-serving reinterpretation of the surrounding trial proceedings), the illusion that MBI seeks to foster is simply too great to be sustained. It is clear from the record (and also, correspondingly, clear, by negative implication, from MBI's discussion of the record) that MBI's Rule 50(a) motion raised the issue of the timing of the contract's termination -- and no other issue. MBI's motion addressed the limited issue of the extent of damages to which MMS was entitled, not the underlying right of MMS to recover its up-front investment for the right to bill MBI's clients at premium rates. No magic words can now be uttered by MBI to conjure the illusion (or perform the transmutation) it seeks to accomplish.

Similarly, the Sixth Circuit did not -- as MBI claims -- "twice" reject the merits of MMS's constitutional and Rule 50 arguments by making a factual finding that MBI actually preserved, in its Rule 50(a) motion, the basis for setting aside the jury verdict by the trial court. (MBI Opposition Brief at 11-12). As noted, a panel majority of a Sixth Circuit panel affirmed the trial court's judgment, which vacated a unanimous jury verdict, "for reasons other than those given by the district court" or advanced in any Rule 50 motion by MBI. (App. A at 11a, 17a; see also App. D at 105a-108a). If the "record" was so clearly in favor of MBI's having advanced in pre- and post-verdict motions the issues upon which the district court premised its judgment, the forum below would not have turned to an alternative basis for affirmance.

II. A CLEAR CONFLICT EXISTS AMONG THE CIRCUITS AS TO THE INTERPRETATION OF FEDERAL CIVIL RULE 50

MBI does not dispute that compliance with contemporary Rule 50 practice with the Seventh Amendment constitutes a substantial and important federal question. It does try, however, to dispute whether there exists a circuit split regarding the disposition of this issue.

MBI pretends that, with respect to Rule 50, all circuits sing from the same song sheet and in perfect harmony; that variations in interpretation of Rule 50 are jurisprudentially coherent and merely consequence of unique and case-specific circumstances. MBI, thus, awkwardly tries to re-characterize Petitioner's substantive contentions as follows: "MBI's real complaint appears to be that . . . uniform interpretation [of Rule 50] gets applied in different ways depending upon the circumstances. That, however, is precisely the function in which courts are supposed to engage." (MBI's Opposition Brief at 8). MBI, of course, fails even to attempt to articulate what principles supposedly animate the case-sensitive outcomes it postulates. MBI is thus unable to attribute successfully even its own reconstituted version to Petitioner's claim.

The petition for certiorari highlights a circuit split in the current Rule 50 practice. MBI seeks to minimize the issue by claiming that the split con-

"*a broad, non-specific question* of whether a party can obtain a post-verdict judgment on a ground that it did not advance in a timely pre-verdict motion." (MBI Opposition Brief at 16) (emphasis supplied). MBI fails, however, to provide any legal analysis in support of its bare claim that "there is a uniform interpretation [of Rule 50] to which all circuits agree. (*Id.*)

Indeed, the one principle that MBI contends is a jurisprudential polestar -- that "a party is barred from obtaining a post-verdict judgment as a matter of law on a ground that it did not advance in a timely filed pre-verdict motion"(MBI Opposition Brief at 18) -- is diametrically at odds with MBI's core contentions *sub judice* below. Petitioner's bedrock point is that this supposedly unwavering principle is indiscriminately dishonored and/or unpredictably ignored. Indeed, there is no principled distinction that serves to differentiate (1) cases where Rule 50 is construed to mean what it says from (2) cases where Rule 50 is instead deemed anemic, toothless and remarkably, as here, even irrelevant. Because there is no principled basis for the discordant judicial interpretations of Rule 50, MBI's self-serving contention that this is "precisely the function in which courts are supposed to engage" falls flat.

Current articulations of the mandates of Rule 50 are, contrary to MBI's suggestion, jarringly cacophonous. A number of federal courts of appeals have, as in the instant case, excused non-compliance with Rule 50(a). Such excusal is sometimes predicated upon reversal of jury verdicts on bases asserted in

pretrial summary judgment motions, even if never raised in Rule 50 motions at trial. See, e.g., Pennbarr Corp v. Insurance Co. of N.C., 976 F.2d 145, 146-47, 149 (3d Cir. 1992); Orlandi v. Goodell, 760 F.2d 78, 80 (4th Cir. 1985). Other courts have excused non-compliance with Rule 50(b). See Cochran v. City of Los Angeles, 222 F.3d 1195, 1200 (addressing on appeal issue raised in Rule 50(a) motion despite failure to make Rule 50(b) motion). Appellate courts have also addressed issues of contract interpretation -- just like the one in this case -- that were lost pretrial and never again raised until after the trial. See White Consolidated Indus., Inc. v. McGill Mfg. Co., 165 F.3d 1185, 1189 (8th Cir. 1999).

The weight of better-reasoned authority characterizes such rulings as "condon[ing] a litigation strategy that disregards the Federal Rules of Civil Procedure 50(a) and 50(b)," and the disagreement recognized in the cases themselves evidences a conflict among the circuits that warrants the exercise of certiorari jurisdiction. See, e.g., Metropolitan Life Ins. Co. v. Golden Triangle, 121 F.3d 351, 356 (8th Cir. 1997) (refusing to address an issue of contract interpretation lost on summary judgment and dropped altogether at trial); Chesapeake Paper Prod. Co. v. Stone & Webster Eng'g Corp., 51 F.3d 1229, 1235-1237 (4th Cir. 1995) (same).

III. CONTRARY TO MBI'S ARGUMENT, THE RECORD HERE SQUARELY PRESENTS THE ISSUE RAISED IN THE PETITION

MBI seems to argue that certiorari should be denied because there exist – amongst the numerous cases in which Rule 50 has been deemed satisfied despite the fact that competent Rule 50 motions were never made -- diverse and varied substantive facts and procedural histories. But this argument is pure makeweight. If it were correct, lackadaisical Rule 50 practice would forever escape this Court's review -- or could only be addressed on an exceedingly narrow piecemeal basis.

As demonstrated in Petitioner's initial brief, this case presents a plain instance of judicial disregard of the requirements of Rule 50, raising significant constitutional concerns. That Rule 50 is variously construed -- and misconstrued -- in a variety of circumstances and scenarios (see, e.g., MBI Opposition Brief at 16-17) is no reason to deny certiorari and, rather, only highlights the judiciary's need for guidance from this Court with respect to an issue that has now too-long percolated unproductively among the circuits.

The disregard of Rule 50's requirements here is paradigmatic of a significant problem pervading current federal civil practice. MBI's Opposition Brief notwithstanding, there now exists uncertainty as to whether a litigant who has not

complied with Rule 50 may nevertheless squeeze itself through an opening in the gate to further judicial consideration. Because litigants almost invariably perceive the stakes in their own cases to be high, this uncertainty fosters an unnecessary (and avoidable) multiplication of proceedings crowding the docket of federal appellate courts -- because litigants who have failed to preserve properly legal issues in accordance with Rule 50, like MBI here, are nonetheless incentivized to see how Rule 50 may happen to be construed by whatever appellate panel they happen to draw. This situation furthers neither justice nor finality.

Given (i) the routine use of Rule 50 by litigants, (ii) the profound and frequently outcome-dispositive implications of its availability across a broad range of substantive legal disputes, and (iii) the constitutional right implicated, there is a chronic and dire need for this Court to intervene in a meaningful manner. The lack of a clear standard makes it crucial that the Court articulate a single clear standard. Unless this Court squarely addresses the issue, trial courts will continue to selectively disregard Rule 50 in a manner that cannot be reconciled with the Seventh Amendment.

CONCLUSION

The petition for a writ of certiorari, accordingly, should be granted.

Respectfully submitted,

/s/_____

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